United States Court of Appeals

FOR THE NINTH CIRCUIT

NO. 20145

JOHN MARSHALL,

Appellant,

vs.

GRANT SAWYER, et al.,

Appellees.

BRIEF FOR APPELLEES

D. I. OPERATING CO.,
a Nevada Corporation;
ALLARD ROEN;
RUBY KOLOD;
DON BORAX;
ARTHUR OSTAP; and
J. G. MURRAY

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

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TOPICAL INDEX

Page

CASES

TABLE OF AUTHORITIES CITED (Continued)

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JURISDICTION

The District Court had jurisdiction of the above entitled action by virtue of 28 USC 1332 (a) (1), 28 USC 1343 (3) and 42 USC 1983.

This Court has jurisdiction of the appeal under 28 USC 1291, 1294 (1) and 2107.

STATEMENT OF THE CASE

Facts

The pertinent facts are not in dispute except for some slight variation between the testimony of plaintiff and certain of the individual non-state defendants, consequently the non-state defendants will not attempt to summarize the facts at the beginning of this brief. They will be referred to later in discussion and argument.

QUESTIONS INVOLVED

1. Was plaintiff ousted by the non-state defendants from the hotel premises?

2. If there was an ousting of plaintiff, did this violate his civil rights?

3. If there was an ousting, did the non-state defendants act "under color of state law" so as to bring them within 42 USC 1983?

4. Plaintiff's complaint prayed for a money judgment only against the non-state defendants, but plaintiff did not offer evidence with respect to his damages. Should not the judgment be affirmed, on this ground alone, as to such defendants?

SUMMARY OF ARGUMENT

The non-state defendants in this brief will attempt to confine the discussion and argument to the issues which chiefly involve them. It appears to the non-state defendants that they might be termed incidental defendants for clearly the main issue is between plaintiff and the State defendants.

It is assumed that if plaintiff should not be successful in his appeal against the State defendants, it follows this Court must hold in favor of the non-state defendants. It is contended by the non-state defendants that even if plaintiff's appeal is successful against the State defendants, it does not follow that the trial court's

judgment should be reversed as to the non-state defendants. Whether or not the non-state defendants are correct in this assumption, they have chosen not to argue in this brief the Constitutional questions which involve plaintiff and the State defendants; however, in this connection, the non-state defendants hereby adopt the argument and conclusions of the State defendants set forth in their brief as an argument on behalf of the non-state defendants, rather than to take the time of this Court by presenting a similar discussion and argument in this brief.

The District Court in its Findings of Fact found that although plaintiff was requested to leave the hotel premises and drink service was refused him, he was assured no physical force would be used upon him and he would not be physically ejected from the Desert Inn Hotel. (Finding XLII). The Court also found that at no time was any physical force or violence visited upon plaintiff by the non-state defendants. (Finding XLIV). In Findings of Fact XLV, XLVI, XLVII and XLIX, the Court found that the non-state defendants had no choice in the matter, were coerced into compliance with the demands of the State Gaming Control Board and were subject to substantial duress and further would not have excluded plaintiff from the hotel premises or the bar operated therein but for the persuasion, duress and coercion of the State defendants.

The non-state defendants argue that based on the evidence and the above findings, there was no ouster of plaintiff and therefore no violation of his civil rights.

They further argue that although the District Court found as a fact that the action of the non-state defendants amounted to state action "under color of state law". (Finding XLVIII), this Finding is clearly based upon the above cited Findings which refer to the coercion put upon the non-state defendants by the State Gaming

Control Board. The non-state defendants argue that the fact they were coerced does not, from the standpoint of the law, put them in the position of having acted "under color of state law". They argue they are not within the provisions of 42 USC 1983, and, therefore, as to them regardless of the outcome as to the State defendants, the Judgment below should be affirmed.

Lastly, the non-state defendants argue plaintiff suffered no pecuniary damage whatsoever by reason of his inability to remain on the hotel premises. (Finding L). Plaintiff presented no evidence whatever on the subject of damages and the non-state defendants contend in the absence of anything in the record to support plaintiff's prayer for damages, there could be no judgment against the non-state defendants. In this respect it must be noted that plaintiff seeks a money judgment only from the non-state defendants (Appellant's Brief - Appendix B).

ARGUMENT

ALLEGED OUSTER - WERE PLAINTIFF'S CIVIL RIGHTS VIOLATED?

It is contended that under the clear undisputed facts there was no ousting of plaintiff from the hotel's premises. On page thirty-eight of Appellant's Opening Brief, the following statement is made: "Only because plaintiff submitted, was actual physical force not used against him. But the threat of force was there". This statement is completely contrary to the Findings of Fact of the trial Judge above cited. Also, there is nothing in the record at all which would support this observation.

The record shows only that a security officer was ordered to tell plaintiff in a nice way to please leave. "Go over there in a nice way and tell him to please

leave, that the place is lousy with agents from the Gambling Commission". (RT 189).

In connection with plaintiff's testimony as to having been requested to leave other establishments that same evening, there was nothing as to physical force or threatened physical force, and the application of common sense would make anyone know that unless force or the threat of physical force is absolutely required because of a necessity for restraint in order to protect others or the person himself, security officers in hotel establishments do not subject themselves to possible actions for assault and battery. Security officers acting in this manner, or threatening to act in this manner, would not long stay employed. Plaintiff contends he was ousted from the hotel premises because after he had two drinks of alcoholic beverages the cocktail waitress advised him that she could not serve him further, and he was requested by certain of the non-state defendants to leave. Mr. Kolod asked plaintiff whether he wanted the hotel to lose its license. Plaintiff answered no, that he did not want this to happen. Plaintiff then testified that after he was given certain names pursuant to his request, he proceeded to leave.

If these facts can be considered to be an ousting or eviction of plaintiff from the hotel premises, do they constitute a deprivation of any civil rights possessed by plaintiff, entitling plaintiff to a legal measure of damages? This alleged ousting, if it was an ousting, was by request, to which plaintiff acceded. In this respect, plaintiff acted like a gentleman. He said in effect that he did not want the hotel to jeopardize its gaming license by his staying on the premises, although he was not happy about the situation, because of the request to leave and because of the injury that could result to the hotel if he did not honor that request, he voluntarily, and of

his own free will, left the premises.

We quote the testimony of the plaintiff as follows:

"Q What did Mr. Kolod and Mr. Roen say?

A They said, 'Look now, you've just got to leave now. We know you. You know we don't mean any harm. These guys are driving us crazy here. They're all around here and threatening the license, they're picking up the cards and are just causing us a lot of trouble. Now, you don't want to do all that and make us maybe lose our license.' I says, 'No; I don't want to do that, but I don't want any of you guys throwing me out of here, either; you'd better not touch me, any of you.' So, they said, 'Oh, no, we won't lay a hand on you.' I said, 'Well, I want all the names of all these people that are asking me to leave and people that won't serve me.'

Q You told them you wanted the names?

A Yes, sir; I did.

Q What did they say?

A They said, 'Yes, we'll give you our names.' They said, 'We won't touch you, we won't throw you out bodily. If that's what you want, you want our names because you want to sue us then that's the way it'll have to be, but we're here to see that you go out.'

Q Did they give you the names?

A Yes, sir; they gave me their names and I wrote them down. I figures, well, I'll have those names when I see my attorney so I could start suit.'" (RT 208, 209).

In order that 42 USC 1983 be applicable to the non-state defendants, it is necessary that they were acting "under color of state law". Assuming for the purpose of argument only, that plaintiff was ousted from the hotel and that his civil rights were violated, it is contended that even so there is no cause of action in plaintiff's favor against the non-state defendants.

It has been held many times that the Fourteenth Amendment is not applicable to individuals, but only to States. This was the holding in the case of Shelley v. Kraemer (1947), 334 US 1-23, where it was said at Headnote 4:

> "Since the decision of this Court in the Civil Rights Cases, 109 U.S. 3, the principle has become firmly embedded in our Constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

The same language was again quoted verbatim in the case of Williams v. Howard Johnson's Restaurant, 268 F. 845. The Court referred to sections 1 and 2 of the Civil Rights Act of 1875, which is the same as the section 1983 with which we are concerned, and then stated that the Fourteenth Amendment does not give any redress from the standpoint of a private individual against private conduct, however discriminatory or wrongful. In this case there was no State or local statute involved, as there is none involved in the case at bar.

The Fourteenth Amendment is the basis of the Civil Rights Acts. The prerequisites to liability under the Civil Rights Acts are:

1. That the defendant act under color of State or local law, and

2. The plaintiff be subjected to a deprivation of any rights, privileges or immunities secured by the Constitution and laws of the United States. Marland v. Heyse, 315 F. 2d 312, (March 26, 1963, Tenth Circuit). In this case the defendant police officers arrested plaintiff on three occasions over a two year period without warrants and without charges ever being subsequently filed. The question was whether this was so arbitrary, unreasonable and without probable cause, as to subject plaintiff to a deprivation of rights guaranteed by the Constitution of the United States. The action was brought under section 1983 and 1985 (3). It was alleged that an individual by the name of Mrs. Frances Heyse had conspired with some of the defendant police officers to cause one of the arrests. The trial court granted a directed verdict to all defendants. The Tenth Circuit reversed to the police officers and affirmed as to Mrs. Heyse because all the police officers had acted "under color of state law"; however, in the case of Mrs. Heyse 'whatevershe may have done', she was not acting 'under color of state law', nor was there evidence of conspiracy, and the trial court therefore had properly granted her motion for a directed verdict.

In the case of United States v. Classic, 313 US 299-341 Mr. Justice Stone, who wrote the opinion, defined "under color of state law" as follows:

> "Misuse of power, possessed by virtue of State law, and made possible only because the wrongdoer is clothed with the authority of State law in action taken 'under color of state law.'"

The above view was reaffirmed in Screws v. United States, 325 US 91-161, and in Monroe v. Pape, 365 US 167.

In Screws, at page 111 the Court said:

"It is clear that 'under color of law' means 'under pretense of law'."

The question is asked by the non-state defendants as to where under the facts of the case at bar did they pretend they were acting under the law? Can it be contended that the "black book" was law, or that Mr. Abbaticchio's letter of March 29, 1960, concerning "black book distribution" (Plaintiff's Exhibit No. 3) was law? It seems that any contention such as this to the affirmative was disposed of by the Court in Marshall v. Sawyer, 301 F.2d, 639, where the court said, commencing at page 644:

"In his complaint, summarized above, plaintiff does not attack the validity of any state statute. Nor does he attack the validity of any numbered regulations adopted by the Nevada Gaming Commission. He does, however, in addition to challenging certain conduct by individual defendants, attack the validity of the black book and the letter of March 29, 1960, which accompanied it, compiled, published, distributed and enforced as alleged. While the attack thereon is not expressly stated to be on constitutional grounds, this is the fair intendment of the complaint, as the appellees concede.

"The question, then, is whether this black book and the accompanying letter of March 29, 1960, compiled and distributed for the purposes and enforced in the manner alleged, constitute an administrative order of general application representing considered

state policy. If so, the single district judge was, in view of paragraphs 2281 and 2284, without jurisdiction to dismiss the action on the ground of abstention. Idlewild Bon Voyage Liquor Corporation v. Rohan, 2 Cir., 289 F. 2d 426, 429.

"This booklet and accompanying letter have some of the attributes of an administrative order of general application. According to the complaint, the booklet represented state policy and was distributed to all hotels in the state which operate gambling casinos. It was not limited in its effect to a particular and contemporaneous transaction, but extended to future activities at hotels all over the state. It was stated in the accompanying letter that the booklet would be 'revised and expanded' periodically, and recipients were advised to give effect to the information therein contained in order to avoid the possibility of license revocation.

"However, when the content of the booklet and letter are examined, it is seen that they are only informational, and advisory releases without any immediate operative effect as administrative orders. The booklet is limited to a recital of the findings made by the state agencies and officials concerning the alleged undesirable character of identified individuals. Insofar as it is described in the complaint, the booklet does not order licensees to do or refrain from doing, anything. The letter calls attention to the booklet and requests 'cooperation' in excluding the identified individuals

from their establishments. Neither the booklet nor the letter were promulgated in the manner prescribed by statute for administrative orders of general application. See N.R.S. Paragraph 463, 145, 150."

Comment may be made here that plaintiff has not contended in his brief that the black book and letter represented State law, and therefore it is assumed that nothing further need be said as to this, other than to comment that relating the facts of the case at bar to the definition in Classic, supra, the non-state defendants possessed no power by virtue of any State law, or, to state it another way, they were not clothed with any authority of State law. In fact, the testimony of Mr. Abbaticchio shows the contrary to be the case. Under cross-examination by Mr. Graves he said in effect that there had been no delegation of any authority to the non-state defendants, and that there was no attempt to clothe them with State authority. His testimony was solely to the effect that the cooperation of the licensees was requested in asking undesirables to leave the premises. (R.T. 449, 450).

The case of Hardyman v. Collins, 80 F. Supp. 501, is very much in point. The case was tried before Judge Yankwich in the Southern District of California. The court held that civil rights could not be impaired by wrongful acts of individuals, unsupported by State authority in the shape of laws, customs or judicial or executive proceedings. In this case there was an alleged conspiracy to interfere with meetings of a democratic club in Los Angeles, California, which was opposed to the "Marshall Plan." A motion to dismiss was granted as the Court held there could be no cause of action against private individuals for such interference.

The Ninth Circuit Court, 183 F. 2d 308, reversed the District Court. The

case was appealed to the Supreme Court, Collins v. Hardyman, 341 US 651, which in turn reversed the Ninth Circuit and agreed with the District Court. The Supreme Court stated that the complaint made no claim as to the conspiracy or the overt acts involving State officials or that defendants ever pretended to act under State law, and therefore under the Civil Rights Act there was no cause of action against individuals.

In Screws v. United States, supra, it was stated:

> "The problem is not whether State law has been violated, but whether the inhabitants of a State have been deprived of a Federal right by one who acts under color of State law."

To the same effect see Shematis v. Froemke, 189 F. 2d 963 (Seventh Circuit). In this case the action of the District Court in dismissing the complaint because it did not contain an allegation that the defendant acted or claimed to act under a color of law, and thus failed to state a cause of action for damages under the Civil Rights Act, was affirmed by the Seventh Circuit.

Also see Smith v. Jennings, 148 F. Supp. 641. In this case State convicts claimed witnesses who testified against them had testified falsely. It was held the defendants were acting as private citizens and not under color of any law or in any official capacity. This Court stated the law to the effect that the Constitution and Federal laws relating to civil rights do not afford protection against activities of private citizens not acting under color of law.

In Dinwiddie v. Brown, 30 F. 2d 465, the Court held that where State officials act wholly within their official responsibilities and do not intentionally cooperate in any fraudulent scheme, the resulting tort is not one committed by State

officials acting under color of State law, and the tort is solely that of the private individuals, the redress of which rests with the State courts.

The Civil Rights Act and Statute giving Federal District Court original jurisdiction of civil actions to redress deprivation of any right secured by the Federal Constitution, or Statute providing for equal rights of citizens or all persons within the jurisdiction of the United States under color of State law, are directed only to State action, and individuals' invasion of other individuals' rights is not within their purview. Oppenheimer v. Stilwell, 132 F. Supp. 761; Whittington v. Johnston, 102 F. Supp. 352; Moffett v. Commerce Trust, 87 F. Supp. 438.

The question of individual invasion of individual rights as coming within Section 1985, is summed up very well by our Supreme Court in the case of Burton v. Wilmington Parking Authority, 365 US 715. At page 721, the Court said:

> "The Civil Rights Cases, 1883, 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835, 'embedded in our constitutional law' the principle 'that the action inhibited by the first section (Equal Protection Clause) of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.' Chief Justice Vinson in Shelley v. Kraemer, 1958, 334 U.S. 1, 13, 68 S. Ct. 836, 842, 92 L. Ed. 1161. It was language in the opinion in the Civil Rights Cases, supra, that phrased the broad test of state responsibility under the Fourteenth Amendment, predicting its consequence upon 'State action of every kind... which denies... the equal protection of the laws.' At p. 11 of 109 U.S.,

at page 21 of 3 S. Ct. And only two Terms ago, some 75 years later, the same concept of state responsibility was interpreted as necessarily following upon 'state participation through any arrangement, management, funds or property.' Cooper v. Aaron, 1958, 358 U.S. 1, 4, 78 S. Ct. 1401, 1403, 3 L. Ed. 2d 5. It is clear, as it always has been since the Civil Rights Cases, supra, that 'Individual invasion of individual rights is not the subject-matter of the amendment,' 109 U.S. at page 11, 3 S. Ct. at page 21, and that private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it. Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which 'This Court has never attempted.' Kotch v. Board of River Port Pilot Com'rs., 330 U.S. 552, 556, 67 S. Ct. 910, 912, 91 L. Ed. 1093. Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance."

Finally on this subject, we need go no further than the case of Marshall v. Sawyer, supra, which certainly must be considered the "law of the case", where the Court said at page 646:

> "The defendants' conduct was engaged in under color of state law if they were clothed with the authority of the state, and were purporting to act thereunder whether or not the conduct complained of was authorized or, indeed, even if it was proscribed by state law. Monroe v. Pape, 365 U.S. 167, 187, 81 S. Ct. 473, 5 L. Ed. 2d 492; Screws v. United States, 325 U.S. 91, 111, 65 S. Ct. 1031, 89 L. Ed. 1495. Whether there is 'color of state law' is a federal, not a state question. Were this not true, a state, acting through its legislature or courts, would have it within its power to immunize its agencies and officials from liability under the Civil Rights Act.
>
> "The second essential element in a Civil Rights Act damage case - conduct which deprives the plaintiff of a constitutional right - is also a question of federal law. The meaning or validity of state statutes or regulations is immaterial to the resolution of this question."

Circuit Judge Pope in his concurring opinion in Marshall v. Sawyer at page 650, said:

> "I have difficulty taking seriously the claim of $150,000 against the hotel for acts which, according to the complaint, came

about through 'coercion, intimidation and inducement' by the State officials, 'by threat of loss of license, upon the hotels of the State.' Jurisdiction here is predicated solely upon the Civil Rights Acts, Sections 1983...of Title 42 U.S.C.A. The first of these sections creates no cause of action against a private individual." (Emphasis added.)

CONCLUSION

For the reasons set forth above and apparent in the record, it is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

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J. A. DONNELLEY, ESQ.

By /s/ J. A. DONNELLEY

Attorneys for the non-state defendants.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ J. A. DONNELLEY
Attorney